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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 750.

SAM C. BLAIR, JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI,
PETITIONER,

VS.

STATE OF MISSOURI, AT THE RELATION OF RAY B. LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITION FOR CERTIORARI.

BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

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BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

PETITION FOR CERTIORARI.

To the Supreme Court of the United States:

Your Petitioner, Glenn C. Weatherby, respectfully alleges:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Glenn C. Weatherby, a citizen, lawyer and taxpayer of Missouri, resident of Platte County, instituted suit in the Circuit Court of Cole County in said state, against a class comprised of several hundred thousand holders of fire insurance contracts, or policies, to recover a reasonable attorney's fee to be paid from a fund belonging to said policyholders, and recovered for them through his efforts, then in the possession of the Superintendent of Insurance of the State of Missouri, for their use.

Such petition named certain policyholders as defendants, who were representative of the whole class, and joined the Superintendent of Insurance as a co-defendant, because he was in possession of said fund, and said petition was based upon the claims—(a) that said Superintendent as the representative of said policyholders, as a class, under authority given him by Section 5678, Revised Statutes of Missouri, 1929, employed him, and associate counsel, as attorneys at law to represent said policyholders, and defend them in an action brought by the fire insurance companies, to obtain an increase in fire insurance rates in Missouri; that he agreed, as such representative, that the said Weatherby should be paid from any fund saved and preserved in said action for said policyholders, the amount of his compensation to be fixed by the court; that said policyholders paid said increase of rates, pending the trial of said cause, and said insurance companies thereupon impounded such excess charges with said Superintendent of Insurance, and when said attorneys defeated the right of said insurance companies to an increase of rates, there was captured, saved, and preserved for said policyholders, as a class, solely through his efforts and his lawyer associates, the impounded fund, in excess of the sum of $1,650,000.

Immediately following the institution of his suit in the Circuit Court of Cole County, the defendant, Super-

intendent of Insurance (the defendant policyholders not joining), applied to the Supreme Court of Missouri for a writ of prohibition to prevent the Cole County Circuit Court from assuming or exercising any jurisdiction of his suit. Preliminary rule was issued, and thereafter on final hearing such rule was made absolute (R. 42). The writ of prohibition was addressed to Judge Sam C. Blair, Judge of the Circuit Court of Cole County, and he was thereby made a party, and appears on the record in this court as the petitioner, although the said Weatherby is the petitioner in fact, and will hereafter be referred to as such.

The facts below were as follows: In June, 1930, the Superintendent of the Insurance Department of the State of Missouri, acting in his official capacity in regard to the regulation of fire insurance rates, and also acting as the representative of all fire insurance policyholders in the state (numbering nearly 500,000) refused to approve an application for a sixteen and two-thirds per cent increase in rates, made by all fire insurance companies doing business in Missouri; that thereupon seventy-four of said companies filed a joint suit in the Circuit Court of Cole County, Missouri, for a statutory review as to the reasonableness of such application for increase; thereupon said Superintendent was called upon to defend said action, both for the state, and policyholders, and under Section 5678, Revised Statutes of Missouri, 1929 (see appendix), employed petitioner and other attorneys to resist said application for said increase, and that during the litigation that followed, all of said policyholders paid such increased rate to said insurance companies, and the same was by them impounded with the Superintendent of Insurance to await the outcome of said litigation; that if said application for said increase was approved by a court of last resort, then said insurance companies were to receive said impounded premiums, but if said application was denied, then said impounded funds were to be returned to said policyholders as provided by Section 5874,

Revised Statutes of Missouri, 1929 (see appendix); that said Superintendent of Insurance for and on behalf of said policyholders, who were the real parties interested, entered into a contract of employment with petitioner and other lawyers (Section 5678, Revised Statutes of Missouri, 1929) employing them to resist said application for said increase, and said matter was litigated for many years, when the Supreme Court of Missouri sustained said Superintendent, and denied such increase (*American Constitution Fire Assurance Co.* v. *O'Malley,* 342 Mo. 139, 113 S. W. 2d 795).

The said contract of employment (approved by the governor) provided, among other things, that if at the end of the litigation, there was an impounded fund saved for the policyholders who had impounded same, then, and in that event, petitioner and his associate lawyers should be allowed to present a claim against said fund for attorneys' fees, to be fixed by the court.

The adverse opinion of the Supreme Court of Missouri, in prohibition (not yet published officially but reported in 144 S. W. 2d 106 and set forth at pages 42 to 48 of the Record) held that petitioner and his associate lawyers were legally employed, as provided by said statute, but that said Superintendent, although employing petitioner and his associates to represent said policyholders, did not have the authority to bind the impounded funds for their compensation, because the Missouri Insurance Code (Sections 5679, 5686 and 5688, Revised Statutes of Missouri, 1929) (See appendix) provided a method to defray the expense of enforcing the insurance laws (R. 46-47), and that petitioner and his associates could only be paid as an ordinary expense of the Insurance Department, from funds provided that department, by the state legislature.

Such opinion is in direct conflict with a former opinion by the Supreme Court of Missouri, involving another phase of the same rate litigation, and involving the same lawyers, *Aetna Insurance Co. et. al.* v. *O'Malley, Supt.* (343 Mo. 1232, 124 S. W. 2d 1164). There, in holding,

that the Insurance Code did not provide any method of payment, the court said: "It is to be noted that Section 5678, *supra*, does not specify how an attorney who has been employed by the Superintendent is to be paid, *nor is there any provision in the Insurance Code as to the method.*" While in the instant case (R. 46) the same court holds that there are two methods provided by the Insurance Code authorizing the payment of attorneys employed, as was Weatherby, and then states: "The plaintiff Weatherby is not seeking payment by either method provided by the statutes." Also, in a case involving these same parties, *State ex rel. Carwood Realty Co.* v. *Dinwiddie, J.* (343 Mo. 592, 122 S. W. 2d 912), this same court in connection with the same fund suggests that counsel must be paid in the same way as any other expense of the Insurance Department. Such opinions are in hopeless conflict as to whether the Insurance Code does or does not provide a method of payment.

The case, brought before this court for review, on petitioner's claim that the opinion of the Supreme Court of Missouri (R. 42-48; 144 S. W. 2d 106) denies to him due process of law and equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution, for these reasons: The opinion holds that petitioner was employed by the Superintendent of Insurance of the State of Missouri, to represent the policyholders in said action, to prevent an increase in insurance rates. But, said opinion denies to petitioner the right to compensation from said fund recovered for said policyholders, solely on the ground that petitioner can only be paid under the Insurance Code, as any other expense of the Insurance Department is paid, evidently referring to Section 5679, *supra*, of said Code which provides, among other things, that "all expenses of the Insurance Department shall be paid monthly out of the amount appropriated by law from fees collected by the Insurance Department" (This being the only section in the Insurance Code, as will appear from a reading of said

sections set out in the appendix, which makes any provision for the payment of general expenses by said Insurance Department). Thus superseding and destroying the common law right of petitioner to be paid from said fund saved and preserved through his efforts (belonging to private individuals) thereby relegating him to the Legislature of Missouri, for his payment.

Petitioner denies that said sections of the Missouri Statute referred to (see appendix) interfere in any way with his payment from the fund in question, but that said sections deal solely with the general and ordinary current expenses of said department, and that as said services were rendered to said policyholders as a class, they should pay for such services. The construction thus placed upon such sections of the statute, *supra*, relegates petitioner to the legislature for any relief, and denies him a judicial forum where he can have a hearing on the value of his services; and denies him due process of law and the equal protection of the law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States. While petitioner concedes the right of the Missouri Supreme Court to construe its own statutes, yet when it construes them in a way to deprive petitioner of his rights under such Amendment to the Constitution, such statutes become unconstitutional as an infringement upon his rights claimed. He is entitled under said amendment to a judicial forum in which any dispute as to the amount or value of his compensation may be judicially determined.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Such holding by the Missouri Supreme Court is in conflict with previous decisions of the court, *Barbier* v. *Connolly*, 113 U. S. 27, 5 S. Ct. 537; *Cincinnati Street Railway Co.* v. *Snell*, 193 U. S. 30, 24 S. Ct. 319; *Truax et al.* v. *Corrigan et al.*, 257 U. S. 312, 42 S. Ct. 124; and *Edward* v. *Kearzey*, 96 U. S. 595. These decisions guarantee

to petitioner a judicial forum where his contract may be enforced. And because of such ruling by the Supreme Court of Missouri, this petitioner has been denied the equal protection of the laws and due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. These questions were raised and kept alive throughout the litigation: (a) In the petition which was filed in the circuit court (R. 10); (b) In answer to the petition for prohibition in the Supreme Court of Missouri (R. 25, 26, 27, 28); (c) In the brief which petitioner filed in the Supreme Court of Missouri; (d) In the motion for rehearing which petitioner filed in the Supreme Court of Missouri (R. 53). The Supreme Court of Missouri in its opinion specifically passed upon the federal rights claimed (R. 47, 48) and denied same.

The employing statute (Section 5678) authorizes employment, but makes no provision for payment, and the general expense statute referred to in the Missouri Supreme Court opinion (Section 5679) and other statutes shown in the appendix, were not construed by this court until several years after the contract of employment was entered into (*Aetna Insurance Co.* v. *O'Malley*, 342 Mo. 1232, 124 S. W. 2d 1164 (1938); *State ex rel. Carwood* v. *Dinwiddie*, 343 Mo. 592, 122 S. W. 2d 912 (1938), and this opinion (144 S. W. 2d 106) (R. 42-48)).

The construction of said statutes, placed thereon by the Missouri Supreme Court (R. 46-48) for the first time, had the effect of denying petitioner due process of law, the equal protection of the law, and the right to a judicial forum.

The Supreme Court of Missouri has decided said federal questions in a way not in accord with the applicable decisions of this court upon analogous questions, and there is a conflict of decision between the highest court of Missouri, and other state and federal courts, as to the rights of an attorney to be paid from a fund preserved and saved for members of a class, under a con-

tract with the representative of such class, for services rendered said class, or even where there is no contract of employment, but the services rendered inured to the benefit of the class, and where there is no statute expressly prohibiting such employment. See this opinion (R. 42-48); *Sprague* v. *Ticonic National Bank et al.*, 307 U. S. 777, 779; *Lindheimer et al.* v. *Telephone Co.*, 292 U. S. 151, and memorandum opinion of the three-judge court in that case allowing attorneys' fees from the fund preserved (see appendix); *Haynie, Parks & Westfall* v. *Camden Gas Corp. et al.*, 186 Ark. 842, 56 S. W. 2d 419; *Board of Education* v. *Lonoke County*, 181 Ark. 1046; *Council of Village of Bedford* v. *State ex rel. Thompson, Hine & Flory, a partnership*, 123 Ohio State 413.

The foregoing federal questions are questions of substance, and of great importance, not only in the State of Missouri, but in numerous other states, which have statutes authorizing the regulation of fire insurance rates. Said questions have not heretofore been, but should be, authoritatively and finally settled and determined by this court.

A decision in this case will go far toward establishing a future standard of conduct for rate making bodies in the employment of special counsel in complicated rate cases. It is a matter of common knowledge, that utilities, in rate making matters, employ lawyers highly skilled in that field, and a state may be handicapped through the use of its duly elected or appointed officials, because such state officers are usually elected or appointed for two or four years. Rate litigation usually lasts many years as the records in this court will show, and cover many changes in administration. Most of the rate cases in this court, it will be observed, were handled by private counsel, skilled in that line (See *Lindheimer case, supra*). If said Missouri statutes, as construed by the highest court of the state in this opinion (R. 42-48), denies the right of counsel to be employed by a rate making body,

and to be paid from a fund impounded during the litigation, such statutes, and each of them, deny petitioner due process of law, and the equal protection of the law as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States and impairs the obligation of a contract in violation of Section 10, Article I of the Constitution of the United States because all other attorneys throughout America, and in other states, have such right of contract.

Wherefore, your petitioner prays that this court, pursuant to United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Statute 973, issue a writ of certiorari to review the judgment of the Supreme Court of Missouri, denying petitioner the right to be paid from a fund belonging to a class, and secured through his efforts.

All of which is herewith respectfully submitted this 7 day of February, 1941.

.....,
Petitioner.
By JOHN T. BARKER,
Attorney.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

SAM C. BLAIR, JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI,
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VS.

STATE OF MISSOURI AT THE RELATION OF RAY B. LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the court below has not yet been officially reported. It appears at pages 42 to 48 of the record, and also in 144 S. W. 2d 106. An application for rehearing was denied without opinion (R. 54).

II.

JURISDICTION.

1.

The statutory provision is Judicial Code, Section 237b as amended by Act of February 13, 1925, 43 Stat. 937 (U. S. C., Tit. 28, Sec. 344b).

2.

The date of the judgment is September 3, 1940 (R. 42). Motion for rehearing was duly filed and denied on November 9, 1940 (R. 54), and said judgment became final.

3.

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237b, *supra,* appears from the following reasons:

The claim of federal constitutional rights was specifically set up in the petition filed in the Circuit Court of Cole County, Missouri (R. 10), and renewed at every stage of the case. On application for prohibition the Supreme Court of Missouri in its opinion specifically passed upon the federal rights claimed (R. 47, 48).

The federal right claimed is that, in denying the petitioner the right to enter into an enforceable contract with the representatives of a class of policyholders, and to be paid from funds, if any, secured for said class as the result of the rate litigation, the State of Missouri, through its Supreme Court, has denied the petitioner the equal protection of the laws, and due process of law, as guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is specially pleaded and invoked (R. 10, 25-28, 54). Incidental to this claim is a further contention of petitioner that the fund in question was and is a private one, belonging to individual policyholders, and in which the state

of Missouri has no interest at all; that the Superintendent of Insurance, who employed petitioner for said policyholders, is and was, the representative of said policyholders, who paid and impounded said fund, during a rate inquiry, and that when it was finally ordered returned to said policyholders, such fund became liable to such petitioner and his associate lawyers, on the theory that they were employed to recapture said fund, and having done so, said fund is liable for their payment. Under no conceivable theory can the state of Missouri have any interest in said fund.

The Missouri Supreme Court (R. 47) holds that petitioner and his associates, were employed, by the representative of said class and for the benefit of said class, but that petitioner cannot maintain a suit against the owners of said fund, policyholders, even though such policyholders have not complained, and might be willing for him to be paid from said fund, because certain sections of the Missouri Insurance Code as set out in the appendix (Sections 5679, 5686 and 5688) require him to be paid as an expense of the Insurance Department, from funds appropriated by the state legislature, to such department.

Such construction was alleged by petitioner to render said acts unconstitutional and to deny him due process of law, and the equal protection of the law as guaranteed him by Section 1 of the Fourteenth Amendment, and further denied him the right to contract (R. 53). Simply to allow him to appeal to the legislature for payment was no remedy at all, and denied him a judicial forum where his claim could be passed upon. Where regular employees of the state contract and understand that they are to be paid by legislative appropriations, it might be that they are accorded due process, but petitioner did not contract to be paid by the legislature, but contracted to be paid from a private fund, belonging to private individuals, in case, through his efforts, such fund was preserved and saved for said policyholders.

Section 5678, *supra* (see appendix), expressly authorized the employment of petitioner, but said section provides no method for payment; the contract, therefore, entered into to be paid from a private fund, if said fund was saved, violates no provision of the Missouri Insurance Code, and is not prohibited by any law of Missouri, and is really a matter which the state could not legislate on, because said fund is privately owned and the state does not or could not have any interest in the same.

Such statutes as construed contemplate that petitioner and his associates be paid only by an appropriation from the legislature, which affords no relief to petitioner at all, but relegates him solely and exclusively to the whim and the caprice of the legislature, and thus denies him a judicial forum.

III.

STATEMENT OF CASE.

Petitioner, a practicing lawyer and taxpayer of the State of Missouri, claims he has been denied the right to maintain a suit against the individual members of a class, to recover from a fund secured for said class, through his representation of them, and relegated to the Missouri State Legislature for his payment (R. 46). Petitioner entered into a contract with the Superintendent of Insurance (representative of a class of policyholders effected), to protect a fund to be impounded by said policyholders, pending a rate review as to the reasonableness of fire insurance rates in Missouri; said contract provided that if petitioner was successful in the rate litigation and prevented an increase, the fund belonging to private persons (policyholders) should be liable to him for the services rendered such private persons (policyholders) and the amount of the fee fixed by the court. Although the State of Missouri has no interest in the fund at all, and although it belongs to private individuals, the Supreme Court of Missouri held that he could not maintain a suit against said private individuals (policyholders) to re-

cover from said fund, belonging to them, but that as he was employed by the Superintendent of Insurance, he could only be paid as an expense of the Insurance Department, that is, from funds appropriated to the Insurance Department by the legislature, from fees paid into said department by insurance companies (R. 46-48). The policyholders, although sued in the Circuit Court of Cole County, made no objection to said suit, and did not join in the petition for prohibition filed in the Missouri Supreme Court.

Petitioner claims that when the Missouri Supreme Court denied him the right to maintain a suit against individuals, to recover from them, money held by the Superintendent of Insurance for them, and afforded him a nonenforceable remedy of applying to the legislature for relief, it infringed upon his right to enforce a contract in a judicial forum, thereby denying him due process of law and the equal protection of the law as guaranteed him by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which was specially pleaded and invoked and kept alive throughout the litigation.

IV.

ERRORS BELOW RELIED UPON HERE; SUMMARY OF ARGUMENT.

The points petitioner urges on this court are in summary form as follows:

1. The State of Missouri denied petitioner "due process of law" by excluding and denying him access to the courts of Missouri to enforce a contract entered into with the representative of a class (policyholders) to recover for services rendered said class.

2. The State of Missouri denied petitioner the equal protection of the laws, by denying him the right to contract with the representative of a class (policyholders) in a normal way, to recover from a fund belonging to said class, which fund was preserved, secured and captured for said class, solely through his efforts.

3. The State of Missouri denied petitioner due process of law, and the equal protection of the laws, by denying him the equitable right to recover from a fund belonging to a class, and secured through his efforts. Such right existing independent of contract.

ARGUMENT.

POINT I.

The State of Missouri Denied Petitioner "Due Process of Law" by Excluding and Denying Him Access to the Courts of Missouri to Enforce a Contract Entered into with the Representative of a Class (Policyholders) to Recover for Services Rendered Said Class.

The opinion of the Supreme Court of Missouri (R. 42-48; 144 S. W. 2d 106), after holding that plaintiff has a legal contract of employment with the representative of a class (policyholders), denied him the right to enforce said contract in any of the courts in Missouri on the ground that the representative of said class had no right to bind the fund saved for said class, because petitioner was employed under a statute of Missouri (Section 5678. See appendix) to enforce the insurance laws of the state, and that under such circumstances he could only be paid by the Insurance Department, as an expense of such department, from funds appropriated to such department, by the Missouri legislature.

Such holding denied petitioner "due process of law" as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and excludes him from each and every court in Missouri, and relegates him solely and exclusively to the whim and caprice of the legislature (this point was saved and preserved throughout the proceedings (R. 10, 25, 26, 27, 28, 53)).

Such right is an unenforceable one because the legislature does not even have to give petitioner a hearing, and may or may not appropriate, as it sees fit. Such hearing, if given, would be a non-judicial one in which no right of appeal exists. The following cases decide

that such holding was a violation of petitioner's right as alleged:

No decision of this court has been found denying the litigant the right to enforce a contract in a judicial forum, but in *Missouri ex rel. Gaines* v. *Canada, Registrar of the University of Missouri, et al.*, 305 U. S. 337, this court held that a Negro could not be excluded from the University of Missouri, and in the instant case, petitioner and his associate lawyers were excluded and denied the right of entry into any court in Missouri, but told that the only relief they had was to appeal to the legislature and subject themselves to its whim or caprice. They were excluded from all courts.

The right to proceed in a judicial forum was claimed by petitioner in the Supreme Court of Missouri, and denied (R. 48), and *Beidler* v. *Tax Commission*, 282 U. S. 1, 8; *Fiske* v. *Kansas*, 274 U. S. 380, and *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261, decide that where a federal right has been asserted and denied, it is the province of this court to ascertain whether the conclusion of the state court has adequate support in the evidence. *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 745, decides that it is the prerogative of this court to inquire not only whether the federal right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. *Bank of Minden et al.* v. *Clement*, 256 U. S. 126, decides that any law which releases a part of the obligation in a contract impairs it (R. 53). (The opinion below holds petitioner's contract of employment legal but after full performance denies him any right of judicial forum to enforce it.) *Barbier* v. *Connolly*, 113 U. S. 27, decides that all persons are entitled to access to the courts of the country for the protection of their persons and property. *Cincinnati Street Railway Co.* v. *Snell*, 193 U. S. 30, decides that the state must provide a forum in which a trial may be had; that

any forum so provided by a state provides equal protection of the law if such method "gives reasonable notice and affords fair opportunity to be heard before the issues are decided" which petitioner claims here the decision of the Supreme Court of Missouri denies him.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill, Treasurer*, 281 U. S. 673, decides that one cannot be deprived of his property, or any of his rights, without being given first an opportunity to be heard in court; that to relegate him to an administrative body which is not subject to judicial control is no remedy; and that such violation exists when that result is accomplished by the state judiciary because the federal guarantee of due process extends to state action through its judicial as well as its legislative, executive or administrative branch of government.

POINT II.

The State of Missouri Denied Petitioner the Equal Protection of the Laws, by Denying Him the Right to Contract with the Representative of a Class (Policyholders) in a Normal Way, to Recover from a Fund Belonging to Said Class, Which Fund Was Preserved, Secured and Captured for Said Class, Solely Through His Efforts.

The Missouri Supreme Court held (R. 47) that petitioner's contract of employment with the Superintendent of Insurance, as the representative of a class (policyholders), was a valid one, and not in violation of any of the laws of Missouri, but held it could not be enforced against a fund secured for said class (policyholders) through the effort of petitioner and his associate attorneys, because, of certain Missouri statutes (see appendix) which provided a method for the payment of all expenses of the Insurance Department, and that plaintiff could only be paid as other expenses of such department were paid. Petitioner claims that said statutes

deal solely with ordinary and current expenses of said Insurance Department and do not attempt in any way to destroy the contract to be paid from said fund, recovered for such class. That to deny him the right to contract with private individuals (owners of said fund) denies him the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment because other attorneys throughout America are allowed to recover from a fund secured through their effort, for a class, on the theory that a rate making body or a body authorized to regulate rates do so as the representative of the public, and, being the representative of the public, may contract for the public as to compensation of attorneys employed to represent the public.

Lindheimer et al. v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658, established the right of telephone users in the city of Chicago to a reduced rate. The litigation was carried forward by the Illinois Public Service Commission, and the decision in the lower federal court was in favor of the telephone company. The City of Chicago intervened upon behalf of telephone users in said city, and employed three Chicago lawyers to appeal the case to the Supreme Court of the United States, where it was reversed, and the right to reduced rates sustained. Thereupon said three private attorneys applied to the three-judge court where the case had been tried, for an allowance against the fund, which had been impounded during the litigation. On the theory that through their efforts said fund was saved and preserved for said telephone users, and such court allowed these attorneys a percentage fee to be paid from said impounded fund, belonging to said telephone users. The opinion was written by Judges Evans, Sparks and Wilkerson, and we have set the same out in the appendix because it is a very able discussion of the rights of attorneys, employed by rate making bodies, to recover from a fund saved to the public. This opinion is not reported in the books, but

was secured from the clerk of that court and we ask a careful reading of it.

Haynie, Parks & Westfall v. *Camden Gas Corporation et al.*, 186 Ark. 842, 56 S. W. 2d 419, decides that attorneys employed by the City of Camden, to represent the city and users of gas in such city, could be paid from a fund impounded and accumulated during the litigation, on the theory that such lawyers represented the users of gas, as a class.

The Superintendent of Insurance in Missouri has supervision over the regulation of fire insurance rates, and it is the universal rule throughout the United States that a rate making body acts for the public, and on behalf of said public:

Lincoln Gas Cases, 256 U. S. 512, 41 S. Ct. 558 (The City Council regulating gas rates).

Arkadelphia Milling Co. v. *Coal Co.*, 249 U. S. 134, 39 S. Ct. 237 (State Board regulating railroad rates).

In re Englehard & Sons Co., Petitioner, 231 U. S. 646, 34 S. Ct., l. c. 259 (City Council regulating telephone rates).

Lindheimer et al. v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658, memorandum opinion in appendix (City of Chicago, Intervenor).

Wright et al. v. *Gas Co.*, 297 U. S. 537, 56 S. Ct. 578 (State Commission regulating gas rates).

O'Connell v. *Pacific Gas Co.*, 19 F. 2d 460 (City regulating gas and electric rates).

State ex rel. Abeille Insurance Co. v. *Sevier, J.*, 335 Mo. 269, 73 S. W. 2d 361 (Missouri Superintendent of Insurance regulating fire insurance rates).

It being the universal rule that a body vested with authority to regulate rates acts as the representative of the public, it naturally follows that to limit the right of

such body in the employment of counsel to represent such public infringes upon the right of contract, as the matter is purely a private one in which the state has no interest. It is also a denial of due process of law and the equal protection of the law as guaranteed by Section 1 of the Fourteenth Amendment.

POINT III.

The State of Missouri Denied Petitioner Due Process of Law, and the Equal Protection of the Laws, by Denying Him the Equitable Right to Recover from a Fund Belonging to a Class, and Secured Through His Efforts. Such Right Existing Independent of Contract.

Sprague v. *Ticonic National Bank et al.*, 307 U. S. 777, is controlling in this case, and decides that where one bondholder brings a proceeding to establish the validity of his bond, and in so doing establishes the validity of similar bonds belonging to other persons similarly situated that "solicitors fees" from the owner of such other bonds, even though not a party to the litigation, and even though no contract exists with them, should be required to contribute to such "solicitors fees" on the theory that where a member of a class renders a service, inuring to the benefit of other members of a class, such other members shall pay part of the costs. Other authorities supporting this view are:

Lindheimer et al. v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658 (memorandum opinion in appendix).

Haynie, Parks & Westfall v. *Gas Co. et al.*, 186 Ark. 842, 56 S. W. 2d 419.

CONCLUSION.

It is conceded that petitioner Weatherby and his associates rendered a valuable service to the policyholders, members of a class, and, as shown by the record, no policyholder has indicated any desire to prevent payment from

said fund. This litigation has been carried on by the Superintendent of Insurance (successor to the employing Superintendent) and not the policyholders. A very small payment on each policy would afford a reasonable fee to petitioner and his associates.

This appears to be the first time that the highest court of a state has ruled that attorneys may not be paid from a fund recovered for individuals through their efforts. Also it appears to be the first time in the history of the legal profession that lawyers have been driven by the courts to the legislature to seek payment for services rendered individuals. This legislative recourse does not afford petitioner a chance to examine witnesses, to appeal from an adverse action, and affords him no remedy at all.

It is respectfully submitted that the highest considerations of public justice require that this court issue its writ of certiorari and review and reverse the judgment of the Supreme Court of Missouri in this case.

JOHN T. BARKER,

Attorney for Petitioner.

APPENDIX A.

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

EASTERN DIVISION.

In Equity, No. 3746.

Illinois Bell Telephone Company, Plaintiff,

vs.

Benjamin F. Lindheimer, Ernest J. Kruetgen, Andrew Olson, G. Gale Gilbert, Phil W. Collins, Paul Samuell, Charles E. Byrne, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, Defendants,

and

City of Chicago, a Municipal Corporation, Intervenor.

Under the decree entered in this suit pursuant to the mandate of the Supreme Court the amount of compensation which should be allowed to the attorneys, Benjamin F. Goldstein, George I. Haight, and Edmund D. Adcock, who conducted the litigation for the City of Chicago and the telephone customers was left undetermined. We are required to fix that compensation now in order that plaintiff may know what to deduct from each subscriber's refund.

Counsel, who are seeking the allowance of fees, call our attention to certain facts which they assert should be given favorable consideration by us. They point to the extended period of the litigation, to the services that they may still be required to perform to see that each subscriber receives the full amount of his refund, to the im-

portance of the litigation, to the great amount of work which they rendered, to the voluminous record showing in part the extent of such labors, to the fact that they were to receive no compensation if they did not prevail in the litigation, and to the complete and overwhelming victory which marked their efforts. They also call our attention to the amount of interest recovered for the subscribers and to the fact that while the services covered some seven years the compensation is all due in a short period, and therefore the income taxes levied on their fees will be disproportionately large.

We are not prepared to accept the last mentioned fact as material to the question before us, although it may reduce the amount of counsel's net compensation very materially.

In view of the fact that counsel's compensation was dependent upon a favorable outcome of the litigation in the Supreme Court, and in view of the fact that it will be much simpler and easier to fix the amount which must be deducted from each customer's refund if the compensation be determined on a percentage of the recovery basis, we have concluded to adopt such method.

In determining what is a fair percentage to be allowed counsel for a successful litigant where the services were rendered on a contingent basis, the percentage however not being fixed, we think it necessary to consider the extent, the character, and the quality of the legal services rendered, the amount involved, the percentage which the recovery bears to the total amount claimed, and perhaps other facts such as the custom or practice prevailing among members of the Bar when they engage in services, the compensation for which is necessarily dependent upon a no pay without victory basis.

Our attention is particularly called to the fact that not only was the recovery the full amount sought, but interest was allowed, a sum more than 25% of the total amount which the customers overpaid the Telephone Company.

Under all the circumstances we have reached the conclusion and do find that seven and one-half (7 1/2) percent, of the amount which the Telephone Company has been ordered to repay to its customers is the fair sum which the counsel should receive as compensation for their services. The Telephone Company is authorized and directed to deduct from the customer's refund seven and one-half (7 1/2) percent. of the amount of refund due the customer. At the end of the three year period from June 1, 1934, if there be any distribution not made, the Telephone Company shall pay counsel the same percentage of all available refunds then undistributed; thereupon further obligation of the Telephone Company in respect thereto shall cease and determine.

In order that the City of Chicago may be promptly reimbursed for the advances made to counsel in the sum of Two Hundred and Ten Thousand Dollars ($210,000), plaintiff is directed to make its first payment to the said City of Chicago in the sum of $210,000 which sum is to be charged against the amount payable to counsel as herein determined. Said advance of fees so to be made shall constitute a part of the deduction of said refunds as hereinbefore provided. The Telephone Company, in order to insure said prompt payment to the City of Chicago, is directed to pay on or before August 31, 1934, to the City of Chicago the sum of Two Hundred and Ten Thousand Dollars ($210,000), and also to pay on account to said attorneys forthwith the sum of Fifty Thousand Dollars ($50,000) for expenses and disbursements by them paid.

Dated: July 23, 1934.

EVAN E. EVANS
WILLIAM M. SPARKS
Circuit Judges.

JAMES H. WILKERSON,
District Judge.

United States Of America Northern District of Illinois ss:

I, Henry W. Freeman, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Memoranda Opinion of Hon. Evan A. Evans, Hon. William M. Sparks, and Hon. James H. Wilkerson filed July 23, 1934, *in the Matter of Illinois Bell Telephone Company vs. Benjamin F. Lindheimer et al* in Equity #3746, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 1st day of June, A. D. 1938.

(Signed) Henry W. Freeman

(Seal) Clerk

APPENDIX B.

Missouri Statutes.

SECTION 5678 REVISED STATUTES OF MISSOURI 1929.

"LOCATION OF OFFICE—CLERKS—LEGAL ADVISER.—The said superintendent shall have his office in the City of Jefferson, and shall keep the same open for business from 8 a. m. to 5 p. m. every day except Sundays and public holidays. He shall have his office in the capitol building and be provided with suitable rooms therein and be furnished with a suitable safe, furniture, stationery, printing and such other things as may be necessary for the transaction of the business of his office. He shall also have one clerk at a salary of one thousand five hundred dollars per annum and if it become necessary for a proper dispatch of the business of the department, said superintendent may employ additional clerical help at an expense not exceeding one thousand dollars per annum, and also to employ such actuarial work to be done as may be necessary, all of which expense shall be paid as provided for by section 5679 out of the amount appropriated by law from the fees collected by the insurance department. The attorney-general shall be his legal adviser, but the superintendent may, with the approval of the governor, employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions. He may also employ suitable persons to make examinations as to the solvency of companies when he deems it necessary: Provided, however, that he shall not employ any person in any capacity who is an officer, agent or employe of any insurance company or association. Said office shall be deemed a public office, and the records, books and papers thereof, or on file therein,

shall be deemed public records of the state. In the management of the assets of the dissolved companies, he shall employ only such clerical and other assistance as the courts having charge of the same may, in the first instance, direct. (R. S. 1919, Sec. 6089)."

SECTION 5679 REVISED STATUTES OF MISSOURI 1929.

"EXPENSES, HOW PAID.—All the expenses of the insurance department now or hereafter incurred and unpaid, or that may be hereafter incurred, including the salaries of the superintendent and deputy superintendent, except the expenses of examinations, valuations or proceedings against any company, and for winding up, dissolving or settling the affairs of companies, which expenses are to be paid by the company, or as provided by this law, shall be paid monthly out of the amount appropriated by law from the fees collected by the insurance department, on warrants drawn upon such fund by the state auditor on vouchers approved by the superintendent; and all the fees received by the superintendent under the provisions of this chapter shall, immediately on receipt thereof, be paid into the state treasury by the superintendent, and shall be placed to the credit of the insurance department fund. The state shall not be responsible in any manner for the payment of any such expenses, or of any expenses of this department, or any charges connected therewith. (R. S. 1919, Sec. 6090)."

SECTION 5685 REVISED STATUTES OF MISSOURI 1929.

"EXPENSES, HOW AND BY WHOM PAID.—The expenses of proceedings now or hereafter had against insurance companies, and of examinations of the assets or liabilities and valuations of policies of insurance companies doing business in this state, shall be assessed by the superintendent of the insurance department upon the company

proceeded against or examined, or whose policies have been valued, and shall be in the first instance paid by such company, on the order of the superintendent, directly to the person or persons making such examination or valuation, or rendering the service. In case of such examination, or valuation or proceeding, if the company has been or shall be adjudged insolvent, or shall neglect, fail or refuse to pay said expenses, the superintendent may, in his discretion, retain from the fees collected under the next succeeding section enough to pay for the same, in whole or in part; and the amount so paid by him, together with costs, charges and fees for collecting the same, shall be a first lien upon all the assets and property of such company, and may be recovered by the superintendent in any court of competent jurisdiction, by suit; or, if said company be in liquidation, or process of being wound up, the cost and expenses of settling its affairs shall, except in cases of companies now in the hands of receivers, be allowed and taxed as costs against said company, and shall be a first lien upon and payable out of its assets. When collected by the superintendent, the amount retained by him shall be by him applied to the reimbursement of the fund of the department, and shall then be paid into the treasury, as provided in section 6090: Provided, however, that before any costs of an examination or valuation shall be paid, vouchers for the same shall be submitted to and approved by the state auditor; and provided further, that when any examination or valuation is made by the superintendent in person, the cost of making the same, excepting his traveling or other necessary personal expenses, shall be paid by him, when collected, into the department fund; and provided further, that the fees for an examination of the assets or liabilities of a company shall not exceed ten dollars per day for any one examiner, together with all necessary expenses incurred and actually paid, and reported under oath of the examiner, and that the fees

for making valuations of policies or other obligations of assurance shall not exceed ten dollars for each million dollars of insurance, or fractional part thereof, for all ordinary forms of policies; and for forms of policies requiring special construction of tables for valuation, the cost of computing such tables shall be added. (R. S. 1919, Sec. 6096)."

SECTION 5686 REVISED STATUTES OF MISSOURI 1929.

"FEES.—There shall be paid to the superintendent of the insurance department by every insurance company doing business in this state the following fees: For filing the declaration required by this chapter on the organization of each company, fifty dollars; for filing statement and certified copy of charter required of companies not organized under the laws of this state, fifty dollars; for filing annual statement of any company doing business in this state, thirty dollars; for filing supplemental annual statement of any company doing business in this state, ten dollars; for filing any other papers required to be filed in his office, ten dollars each; for filing agent's copy of his company's certificate of authority or license, two dollars; for furnishing copies of papers, records and documents filed in his office, per folio, twenty cents; for affixing seal of office, one dollar. (R. S. 1919, Sec. 6097.)"

SECTION 5688 REVISED STATUTES OF MISSOURI 1929.

"DEFICIENCIES, HOW MET.—In case the expenses of this department, including the salaries paid to the superintendent and deputy superintendent, shall exceed the amount collected under section 5686, the superintendent shall, annually, assess upon all insurance companies doing business in this state a sum equal to such excess, which he shall collect and apply in like manner as by this chapter authorized and required in respect to the fees payable by

such companies. Such assessments shall be made in proportion to the relative amounts of the assets of each company. (R. S. 1919, Sec. 6099.)"

SECTION 5874 REVISED STATUTES OF MISSOURI 1929.

"ORDER OF SUPERINTENDENT SUBJECT TO REVIEW BY COURT—FUNDS TO BE DEPOSITED IN RESPONSIBLE BANKS.—The orders and directions of the superintendent of insurance, together with his findings or determinations of facts upon which such orders or determinations are founded, shall be reviewable by a proper action in the courts, and upon such review the entire matter shall be treated and determined *de novo*, but the burden of proof as to the unreasonableness or injustice of any order made by the superintendent of insurance shall rest upon the party or company, or companies, appealing from such order. The court shall have authority to sustain, set aside or modify the orders and directions under review. During the pendency of such action or review, the orders and directions of the superintendent of insurance, as to reduction of rates, shall be suspended, but all such insurance companies shall, during the pendency of such action or review, deposit with the superintendent of insurance on all policies issued or renewed after the date of such order or direction, and until the final determination of such action, an amount equal to the difference between the rates fixed by the superintendent in his order and those in effect prior thereto, such funds to be held by the superintendent of insurance to await the result of such review, and in the event the orders and directions of the superintendent be set aside, such funds shall be returned to the companies pro rata, and in the event his orders and directions shall be sustained, then such funds shall be turned over to the policyholders pro rata. The superintendent shall deposit all such funds so held by him in responsible banks and shall require good and sufficient bond for safekeeping and proper accounting. Provided, that said banks shall pay, for the benefit of such funds, not less than the lowest rate paid for state funds during such time, such interest to be computed on daily balances. (R. S. 1919, Sec. 6284. Amended, Laws 1923, p. 234.)"

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

NO. 750.

SAM C. BLAIR, JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI, *Petitioner*,

vs.

STATE OF MISSOURI, AT THE RELATION OF RAY B. LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RESPONDENT'S BRIEF IN OPPOSITION TO ISSUANCE OF WRIT.

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I.

OPINION OF THE COURT BELOW.

The opinion of the court below has not been as yet officially reported, but may be found in 144 S. W. (2d) 106, and also appears at pages 42 to 48 of the record in this cause.

II.

STATEMENT OF THE CASE.

Section 5678 of the Revised Statutes of Missouri, 1929, provides that the Attorney General shall be the legal adviser of the Superintendent of the Insurance Department, but that said Superintendent may, with the approval of the Governor,

employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions.

Section 5679 of said Statutes provides that all the expenses of the Insurance Department, except certain expenses not material to the issues herein, shall be paid out of the amount appropriated by law from the fees collected by the Insurance Department. Provision is made in the statutes for the payment of fees into the Insurance Department fund out of which appropriations for the expenses of the Insurance Department are to be made.

(All of the pertinent statutes herein referred to are set out in Appendix B, at page 26 of Petitioner's brief, and are not, therefore, set out again in Respondent's brief.)

Petitioner Weatherby filed a suit in the Circuit Court of Cole County, Missouri, alleging that on December 1, 1930, he had been employed by the Superintendent of the Insurance Department of Missouri, with the approval of the Governor, as counsel to assist in the defense of a rate review suit and to save, preserve and recapture such increased premiums as the policyholders had paid into court in connection with said suit (R. 6). His petition also alleged that he had faithfully performed his services in connection with his employment and that the defense of said action resulted in defeating the proposed increase of rates, and that thereby there was saved, preserved and recaptured for the policyholders the entire impounded fund amounting to approximately $1,650,000 (R. 6, 7). Said petition also alleged that the funds thus saved, preserved and recaptured should be made to bear the expense of its recovery, including attorney's fees (R. 7), and prayed the court to fix and determine the reasonable value of petitioner's services as an attorney in said rate review case, and to impress said allowance as a lien upon said impounded fund.

The Superintendent of the Insurance Department filed in the Supreme Court of Missouri an application for a writ of prohibition directed against the Circuit Court in which the petition of said Weatherby was pending, said Superintendent contending that the said Circuit Court was without jurisdiction and authority to allow the petitioner Weatherby a fee out of the impounded fund and to impress a lien upon said fund in his favor (R. 1). Upon a hearing of said prohibition case

the Supreme Court of Missouri made its preliminary rule in prohibition absolute, thus preventing the Circuit Court of Cole County, Missouri, from entertaining petitioner's action for an attorney fee out of the impounded funds.

In its opinion the Missouri Supreme Court held that petitioner Weatherby had been employed under statutes of said state which provided a method for his payment (R. 47), and that therefore he had no claim against the impounded fund upon which he was seeking to impress a lien (R. 48). The opinion held that the Circuit Court of Cole County did not have jurisdiction to impress a lien upon the policyholders' funds in favor of petitioner Weatherby because no such lien existed, said Circuit Court being bound by statutory limitations placed on the power of the Superintendent of Insurance in making the contract of employment with petitioner Weatherby.

III.

SUMMARY OF ARGUMENT.

The points respondent urges on this Court are in summary form as follows:

I. The decision of the Supreme Court of Missouri as to the meaning of the Insurance Code of that state is binding upon this Court.

II. Petitioner Weatherby was not employed by policyholders interested in the fund upon which he seeks to impress a lien, but he was employed by the Superintendent of the Insurance Department of Missouri under statutory authority, which statutes, including the method of payment, became a part of the contract of employment.

III. The regulation of insurance business by the State of Missouri is a proper exercise of its police power.

IV. The Fourteenth Amendment to the United States Constitution is not violated by reasonable restraints upon the right to contract.

ARGUMENT.

POINT I.

The decision of the Supreme Court of Missouri as to the meaning of the Insurance Code of that state is binding upon this Court.

The case of *Hartford Accident Co.* vs. *Nelson Co.*, 291 U. S. 352, 358, announces the well established rule that the interpretation of a statute of a state by the courts of last resort of that state is binding upon this Court. In fact, petitioner concedes (P. 6, Brief) that the Missouri Supreme Court could construe its own statutes, but insists that said statutes as so construed are unconstitutional.

POINT II.

Petitioner Weatherby was not employed by policyholders interested in the fund upon which he seeks to impress a lien, but he was employed by the Superintendent of the Insurance Department of Missouri under statutory authority, which statutes, including the method of payment, became a part of the contract of employment.

The opinion of the Missouri Supreme Court held (R. 47) that petitioner Weatherby was not employed by a group of individuals, to-wit, the policyholders interested in the rate reduction, but that he was employed by the Superintendent of Insurance of Missouri under authority of statutes which provided under what conditions special counsel could be employed and in what manner such counsel could be paid. Said opinion also held (R. 46) that the statutes of Missouri expressly provided how all expenses of the Insurance Department of Missouri should be paid, and that the payment to petitioner for his services under his contract of employment was one of the expenses so provided for. This interpretation of the statutes of Missouri by its court of last resort being binding upon this Court, the only question before this Court is whether the State of Missouri could enact statutes which provided how petitioner could be employed by the State and how he could be paid. In other words, did petitioner Weatherby have a

right under the Fourteenth Amendment to the Constitution of the United States to be employed by the State in a certain way and to be paid in a certain manner, which right the State could not by statute abolish?

Said petitioner admitted that he was employed by the Superintendent of Insurance by virtue of certain statutes of the State (R. 6). The Missouri Supreme Court held that the statutes authorizing his employment and providing for his payment became a part of his contract of employment, the court using the following language (R. 47):

> "The attorney was not employed by the policyholders. He was employed by the superintendent under his statutory powers, which statutes, including the method of payment, became a part of the contract of employment."

Petitioner claims that he has been denied due process by being denied the right to contract with the representative of the policyholders in a normal way. We submit that petitioner could not have been employed by the representative of the policyholders had not such representative been authorized by statutes to employ him. He was employed by virtue of statutes, and the question now is whether he can accept employment by the State under a contract which provides for his compensation in a certain manner and then claim that if he is not allowed to seek other compensation than that provided by his contract of employment, he is denied due process of law and equal protection of the law.

The cases cited by petitioner in his brief are not in point for the reason that the attorneys in those cases were not employed under statutes which provided for their compensation in a particular manner. Petitioner's situation is not the same as an attorney who contracts with private individuals, against whom the law would imply certain obligations. He was employed by the State of Missouri under statutes which provided both the method of his employment and the method of his payment. He was not denied the right to contract. He did contract in accordance with the statutes of the State of Missouri, and he cannot complain that the State did not authorize its officer, the Superintendent of Insurance, to provide different methods of payment than the statutes set out. The statutes were in force before petitioner accepted

his employment, and if he elected to accept employment under them, he must abide by the terms of his employment as outlined in said statutes.

POINT III.

The regulation of insurance business by the State of Missouri is a proper exercise of its police power.

The case of *German Alliance Ins. Co.* vs. *Hale*, 219 U. S. 307, 316, is authority for the proposition that the regulation of insurance business, and particularly the matter of the determination of rates, is a proper subject for the exercise of the police power of a state. To the same effect is the case of *German Alliance Ins. Co. vs. Kansas*, 233 U. S. 389. It must follow, therefore, that if the State of Missouri has the right to regulate insurance business and to control the fixing of rates charged the public, the statutes of Missouri which authorized its Insurance Department to employ petitioner to enforce the statutes of the state regarding insurance rates are constitutional. If the State has the right to provide for the employment of attorneys to help enforce the insurance laws, it would certainly have the right to provide how such attorneys shall be paid.

If counsel employed by a State could have a lien on the proceeds of litigation conducted by the State, then the State would lose its control of such litigation since counsel would have such an interest in the outcome of the litigation that they could say whether such litigation should be abandoned or should be carried on in a particular manner. In such a situation the State would be thwarted in the exercise of its police power and other functions since it would not have control of the enforcement of such power and functions but would have to divide such control with attorneys claiming a lien upon the outcome of the litigation. In other words, if the State should determine that it should abandon a rate review suit, it could not do so because its attorneys would claim that they had a contingent interest in the outcome of such a suit. It, therefore, appears evident that the State must have the right to provide how attorneys employed by it shall be paid in order that it may control litigation in which it is interested.

The Supreme Court of Missouri has held that the enactment of the Insurance Code of that state indicated an intention on the part of the General Assembly to regulate the insurance business from beginning to end, thereby protecting individual and public interests (*State ex rel. Missouri State Life Ins. Co.* vs. *Hall*, 330 Mo. 1107, 1116, 52 S. W. (2d) 174, 177), and this holding was approved in the case objected to by petitioner here (R. 44).

POINT IV.

The Fourteenth Amendment to the United States Constitution is not violated by reasonable restraints upon the right to contract.

In the case of *Hardware Dealers Mutual Fire Ins. Co.* vs. *Glidden Co. et al.*, 284 U. S. 151, 157, this Court held that reasonable restraints upon the right to contract do not violate the Fourteenth Amendment. Likewise, in the case of *Barbier* vs. *Connolly*, 113 U. S. 27, 31, this Court held that the Fourteenth Amendment was not designed to interfere with the exercise of the police power by a state.

Petitioner Weatherby was not deprived of his right to contract, and the only restriction on his right to contract with the State of Missouri was that if he did so contract, he should be paid in the manner that the state law provided. Such provisions as to his contract were the same as the provisions for all others similarly contracting with the State, and therefore petitioner was not denied the equal protection of the law by reason of such statutes.

CONCLUSION.

We respectfully submit that petitioner has not been denied the right to contract and has not been denied due process of law, but that he is seeking to obtain compensation other than that provided by his contract of employment. It is not the denial of due process or of equal protection of the law to hold a man to his voluntary contract, and the petitioner, who has accepted employment under statutes of a state which provide for his compensation, should not be heard to complain that he cannot be paid in the same manner as an attorney who contracts with a private individual.

Respectfully submitted,

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